SIME BANK BHD

v.

WU CHIN LENG & ANOTHER APPEAL

FEDERAL COURT, KUALA LUMPUR
WAN ADNAN ISMAIL CJ (MALAYA)
MOHAMED DZAIDDIN FCJ
ABU MANSOR ALI FCJ
[CIVIL APPEAL NOS: 02-3-1999(W) & 02-4-1999(W)]
7 NOVEMBER 2000

CONTRACT: *Guarantee - Guarantors - Liability - Joint liability - Contracts Act 1950, s. 97 - Whether there was an understanding that all directors sign guarantee - Whether the understanding known to bank*

The respondents were the directors of Cornwood Industries Sdn Bhd ("the company"). They were sued by the appellant as guarantors for a loan advanced by the appellant to the company. It was their contention that the guarantees to which they were parties to were invalid because one of the company's directors ("Soh") did not sign the guarantees. The trial judge however gave judgment in favour of the appellant and held that the issue was irrelevant to the respondent's liability since Soh had not been a director at the material time. The respondents appealed to the Court of Appeal and the appeal was allowed with costs. The appellant then appealed to the Federal Court. The single issue raised in these appeals was whether the Court of Appeal was correct in holding that there was an arrangement between the parties which constituted a contract within the meaning of s. 97 Contracts Act 1950. The crucial question to be considered was whether the respondents signed the guarantees on an understanding that all the directors shall sign the guarantees and if one of them did not sign, the guarantees would be invalid and this was known to the appellant.

Held:
Per Mohamed Dzaiddin FCJ

[1] The condition precedent is predicated on a contract made between the person who gives the guarantee and the creditor and in the context of s. 97 Contracts Act 1950, the contract means an understanding between the guarantors and the creditor that the guarantee is only valid if all the guarantors sign the guarantee.

[2a] Based on the evidence as a whole, no reasonable inference could be drawn that there was an understanding between the respondents and the appellant that all directors must sign the guarantees.

[2b] The inference that could be drawn was that the intention of the parties was for the directors to sign the guarantees quickly and there was no intention on their part that they signed the guarantees on condition that all the directors signed.

[3] To constitute a contract within the meaning of s. 97 Contracts Act 1950, the understanding must be clear and known to the appellant. In the instant case, the very least, what could be inferred from the evidence adduced was that there was only a unilateral understanding on the part of the respondents and the directors of the company that all directors must sign the guarantees.

[4] There was no understanding between the appellant and the guarantors which constituted a contract within the meaning of s. 97 Contracts Act 1950 that all directors of company shall sign the guarantees and since one of them did not sign, the guarantees were invalid.

[Appeal allowed with costs; Orders of High Court restored.]

*[**Bahasa Malaysia** Tranlation of Headnotes]*

Responden-responden adalah merupakan pengarah-pengarah Cornwood Industries Sdn Bhd ("syarikat tersebut"). Mereka telah disaman oleh perayu sebagai penjamin kepada satu pinjaman yang diberikan oleh perayu kepada syarikat tersebut. Responden-responden mengatakan bahawa gerenti yang mana mereka adalah merupakan pihak-pihak kepada adalah tidak sah kerana salah seorang daripada pengarah syarikat tersebut ("Soh") tidak menandatangani gerenti tersebut. Hakim bicara telah memberi penghakiman yang memihak kepada perayu dan memutuskan bahawa isu tersebut adalah tidak relevan kepada liabiliti responden-responden kerana Soh bukanlah seorang pengarah pada masa matan. Responden-responden merayu ke Mahkamah Rayuan dan rayuan tersebut dibenarkan dengan kos. Perayu kemudiannya merayu ke Mahkamah Persekutuan. Isu tunggal yang dibangkitkan dalam rayuan-rayuan ini adalah samada Mahkamah Rayuan betul dalam memutuskan bahawa terdapat satu perkiraan di antara pihak-pihak yang mana dapat dijadikan sebagai satu kontrak dalam ertikata s. 97 Akta Kontrak 1950. Persoalan penting yang perlu dipertimbangkan ialah samada responden-responden menandatangani gerenti tersebut dengan kefahaman bahawa kesemua pengarah akan menandatangani gerenti tersebut dan jika salah seorang dari mereka tidak menandatangani gerenti tersebut, ianya akan menjadi tidak sah dan perkara ini dimaklumi oleh perayu.

Diputuskan:
Oleh Mohamed Dzaiddin HMP

[1] Syarat terdahulu akan dikemukan pada sesuatu kontrak yang dibuat di antara seseorang yang memberi jaminan dan seorang pemiutang dan dalam konteks s. 97 Akta Kontrak 1950, kontrak bermaksud satu persefahaman di antara penjamin-penjamin dan pemiutang bahawa gerenti tersebut hanya sah jika kesemua penjamin menandatangani gerenti tersebut.

[2a] Berdasarkan pada keterangan secara keseluruhannya, tiada inferens yang munasabah dapat disimpulkan bahawa terdapat satu persefahaman di antara responden-responden dan perayu bahawa kesemua pengarah mesti menandatangani gerenti tersebut.

[2b] Inferens yang dapat diambil adalah bahawa pihak-pihak mempunyai niat yang pengarah-pengarah menandatangani gerenti tersebut dengan segera dan tidak terdapat niat pada pihak mereka bahawa mereka menandatangani gerenti tersebut dengan syarat kesemua pengarah menandatanganinya.

[3] Untuk menjadikan satu kontrak dalam ertikata s. 97 Akta Kontrak 1950, sesuatu persefahaman itu mestilah jelas dan dimaklumi oleh perayu. Dalam kes semasa, yang hanya dapat diinferkan dari keterangan yang dikemukakan hanyalah terdapat satu persefahaman pada sebelah pihak responden-responden dan pengarah-pengarah syarikat tersebut sahaja bahawa kesemua pengarah hendaklah menandatangani gerenti tersebut.

[4] Tidak terdapat persefahaman di antara perayu dan penjamin-penjamin yang dapat dijadikan satu kontrak dalam ertikata s. 97 Akta Kontrak 1950 bahawa kesemua pengarah syarikat tersebut mestilah menandatangani gerenti tersebut dan bilamana seorang dari mereka tidak menandatanganinya, gerenti tersebut tidak sah.

[*Rayuan dibenarkan dengan kos; Perintah Mahkamah Tinggi dikembalikan.]*

Case(s) referred to:
Ayyanna v. Veerabhadram AIR [1926] Mad 62 ***(refd)***
Byblos Bank SAL v. Al-Khudhairy [1987] BCLR 232 ***(refd)***
Evans v. Bremridge [1855] 44 ER 327 ***(refd)***
Hansard v. Lethbrigde & Ors [1892] 8 TLR 497 ***(refd)***
Indinan Bank v. Raja Suria [1993] 2 SLR 497 ***(refd)***
James Graham & Co (Timber) Ltd v. Southgate Sands [1985] 2 All ER 344 ***(refd)***
Len Min Kong v. United Malayan Banking Corp Bhd [1998] 2 CLJ 879 ***(refd)***
Marston v. Charles Griffin & Co Pty Ltd [1985] NWSLR 294 ***(refd)***

Stramit Industries Ltd v. Reinhardt [1985] 1 Qd R 562 ***(refd)***
Taubmans Pty Ltd v. Loakes [1991] 2 Qd R 109 ***(foll)***
TCB Ltd v. Gray (1988) All ER 108 ***(refd)***
The City Bank v. Reynolds & Ors [1889] vol 4 WN (NSW) 64 ***(foll)***

Legislation referred to:
Contracts Act 1950, ss. 2, 97

Contract Act 1872 [India], s. 144

Other source(s) referred to:
Pollock and Mulla on the Indian Contract and Specific Relief Acts, 11th edn, vol II, p 995
Sanjiva Row on Contracts and Law Relating to Tenders, 9th edn, vol 3
The Indian Contract Act, Cunningham & Shepherd, 11th edn, p 36
The Law of Guarantees in Singapore and Malaysia, Low Kee Yong 1992, p 118
The Modern Contract of Guarantees, Philips and O'Donovan 2nd edn, p 83

Civil Appeal No: 02-3-99(W)
For the appellant - DP Naban (Yap Boon Hau with him); M/s Lee Hishammuddin
For the respondent - Franklin Goonting (Marina Netto with him); M/s Lim Soh & Goonting

Civil Appeal No: 02-4-99(W)
For the appellant - DP Naban (Yap Boon Hau with him); M/s Lee Hishammuddin
For the respondent - Alex Anthony; M/s Anthony, Chew & Lim

[Appeal from Court of Appeal; Civil Appeal Nos: W-02-85-1995 & W-02-84-1995]

Reported by Izzaty Izzuddin

JUDGMENT

Mohamed Dzaiddin FCJ:

These two appeals which were heard together on 30 September 1999 and the subject of one judgment were from the decision of the Court of Appeal. They raised a single issue on whether the Court of Appeal was correct in holding that there was an arrangement between the parties which constituted a **contract** within the meaning of s. 97 of the Contracts Act 1950 (the Act).

Background

The background of this case is set out in full in the judgment of the Court of Appeal, reported in [1998] 2 CLJ 879; [1998] 2 MLJ 478. The appeal was from the decision of the High Court Kuala Lumpur dated 16 November 1994. The respondents were the directors of a company known as Cornwood Industries Sdn. Bhd., the first defendant in the High Court. The

respondents were sued by the appellant bank as guarantors of a loan that had been advanced to the company which they resisted on two grounds. First, they contended that the guarantees to which they were parties were invalid because one Soh Chin Seong, who according to the respondents, was a director of the company at the material time, did not execute the guarantees. Soh, however, was not a defendant to the action. Secondly, the bank had not proved the actual sum for which the respondents were allegedly answerable.

The trial judge found against the respondents on both grounds and entered judgment for the bank. In respect of the first ground relied upon as a defence, the learned judge held that Soh had not been a director of the company at the material time. His Lordship therefore concluded that the failure of Soh to join in the guarantees executed by the respondents was irrelevant to the respondents' liability. As regards the second ground, the trial judge held that the bank had sufficiently proved the sum due to it. Hence, the appeal.

Proceedings In The Court Of Appeal

The appeals were directed against the above findings of the High Court. The main issue was whether Soh was a director of the company and his failure to join in executing the guarantees had the effect of rendering the guarantees, P1 and P2 invalid. After hearing counsel, the court found in favour of the respondents and allowed the appeals with costs.

On the question of whether Soh was a director of the company at the material time, the court found that this was essentially a question of fact. After reviewing the evidence, the court disagreed with the finding of the High Court and held by way of inference that Soh was a director at the material time.

With respect to the validity of the guarantees, P1 and P2 as affecting the respondents, the court was in agreement with Encik Goonting, counsel for the respondents, that s. 97 of the Act applied.

Section 97 of the Act states:

> Where a person gives a guarantee upon a contract that the creditor shall not act upon it until another person has joined in it as co-surety, the guarantee is not valid if that other person does not join.

In construing s. 97, the court considered and reviewed the following authorities:

(1) A commentary in *Sanjiva Row on Contracts and Law Relating to Tenders* (9th edn.) vol. 3 on s. 144 of the Indian Contract Act 1872, (identical with s. 97 of the Act) p. 2426:

> The section seems to be based on *Evans v. Bremridge* [1855] 44 ER 327 and *Bonsor v. Cox* [1841] 49 ER 385. A person who enters into an obligation of suretyship on the understanding and faith that another person would also enter into, has right to be relieved on the ground that the instrument has not been executed by the intended surety. In the above-noted case, the creditor prepared a deed in such a way as to show that it was intended to contain a joint and several covenant by two co-sureties and sent it in that form to be executed by one of them and never afterwards informed him that it had not been executed by the other surety, but on the contrary wrote to him as 'one of the surety', it was held in equity, the surety was entitled to be relieved of liability. For similar reason, a surety bond which after execution by three of the sureties is in a material respect altered by the fourth, when he executes it, is inoperative against all. It became inoperative against the three on account of alternation by the fourth, and against the fourth it was only a joint and several bond that he intended to execute. The rule of the section, however, will not apply to cases of joint and several obligation where the transaction is not really a guarantee, but a primary undertaking, though the word guarantee is used. A guarantee drawn up in plural number, but signed by one surety only, is binding on the surety who signed in the absence of proof that the person who signed the document was only to be bound in case his partner also joined.

(2) *Ayyanna v. Veerabhadram* AIR [1926] Mad 62, where Jackson J referred to a commentary by Cunningham and Shepherd, *The Indian Contract Act*, 11th edn. p. 36.

(3) A commentary on s. 144 of the Indian Contract Act from *Pollock and Mulla on the Indian Contract and Specific Relief Acts* (11th edn.), vol. 11 (p. 995).

(4) *The City Bank v. Reynolds & Ors.* [1889] Vol. 4 WN (NSW) 64, where according to the Court of Appeal, the facts were much akin to the present case. The bank brought an action against five of the seven directors of the Sydney Mining Club and Exchange Company Ltd. upon a guarantee given by them to secure to the bank the repayment of moneys advanced to the company. The defence was on equitable grounds that there being seven directors of the company, it was agreed that all should sign the guarantee before any money should be advanced and that the bank had advanced money to the company although only five of the seven directors had signed the guarantee.

Evidence was given on behalf of the bank that they advanced the money at the express request of the defendants to do so before obtaining the signatures of the other directors. The defendants denied, but the jury found for the bank.

In the case of Reynolds, one of the defendants, he was not present when the request to pay before all signatures were obtained were made to the bank, he having, in fact, signed the guarantee first and when no other defendants were present. Therefore, his liability would depend upon the **contract** which was in the first instance entered into between the bank and the directors of the company. The court therefore found it necessary to examine the **contract** which was originated by a letter dated 20 April 1887 written by the company's secretary to the bank's manager applying for an overdraft not exceeding 500 pound sterling to be secured to the bank by a guarantee to be signed by all the seven directors including Reynolds, who were the first board appointed. On 22 April 1887, the manager replied stating that the application for an overdraft had been granted upon the joint and several guarantees of the directors and upon their calling at the bank and signing the guarantee the money would be placed at the company's disposal.

Based on the letters, the court found that the bank was asked to make an advance upon a guarantee signed by seven persons and it was informed that these seven persons were the first board of directors of the company. The bank undertook to place the money at the disposal of the company upon the seven persons forming the board calling at the bank and signing the joint and several guarantee. The court found Reynolds not liable as it was clear that when Reynolds called at the bank and signed the guarantee before any of the other directors did so, he must have done so on the **faith and understanding** that no money would be advanced except on the terms mentioned in the bank's letter dated 22 April 1887.

(5) *Stramit Industries Limited v. Reinhardt* [1985] 1 Qd R 562 which reviewed several authorities including *Evans v. Bremridge* and *Reynolds, supra.*

Based on the above authorities, the Court of Appeal enunciated five propositions on s. 97. First, s. 97 embodies the rule in *Evans v. Bremridge* that "a surety who entered into the obligation upon the understanding and faith that another person would also enter into it ... has a right in equity to be relieved on the ground that the instrument has not been executed by the intended surety." Secondly, when interpreting s. 97, guidance may reasonably be sought from cases decided in other jurisdictions, which do not have any provision in their written law parallel to s. 97 of the Act or

s. 144 of the Indian equivalent. Thirdly, the phrase **'upon a contract'** in s. 97 does not confine the parties to the contract of guarantee itself but includes an **arrangement** between them, collateral to the main contract, whereby it is contemplated that more than one person should execute the guarantee, In another word, a guarantor who invokes the benefit of the section is at liberty to adduce evidence that there existed an arrangement between the parties that made his liability under the guarantee depend upon the execution of the guarantee by another guarantor. Fourthly, whether an arrangement as contemplated by s. 97 exists is a question of fact or inference. If the arrangement is based entirely on oral testimony then it is a pure question of fact based on credibility for the trial judge to determine. On the other hand, if the evidence includes contemporaneous documents, it is incumbent on the court to view the evidence as a whole and to draw such inferences as they properly admit. Fifthly, if it is a matter of inference, the appellate court is duty bound to examine the record to see if the trial judge had adopted a correct approach and had drawn proper inferences from the admitted or proved facts and if it should find the trial judge was in error, the appellate court is entitled to draw its own inferences and reverse the judge's conclusion. This, the court found, was what had happened in *Stramit Industries Ltd.*

Applying the above propositions, the Court of Appeal found as follows (at p. 496):

> The present instance is not a case where the issue under consideration is one that turns upon credibility of oral testimony. It is truly a case where the issue that calls for resolution depends upon drawing the proper inferences from the totality of the evidence.
>
> We have earlier in this judgment adverted to the several pieces of oral and documentary evidence in connection with the first issue. Some, if not all, of these are equally relevant to the second issue, in particular, the oral testimony of the respondent's witness (PW3). In our judgment, the only reasonable and probable inference that is admitted by the evidence when taken as a whole, including the respondent's letter to the company dated 12 January 1977, is that there was a **contract** between the parties that Soh shall join the guarantees. Since he did not do so, the guarantees in the present case are, according to the terms of s. 97, invalid. The judge should have so found. He erred in not so holding.

The court concluded thuswise:

> To sum-up, the second and third appellants have sufficiently demonstrated that:
>
> (i) Soh was a director of company at all relevant times and that the trial judge was wrong in holding to the contrary;

(ii) there was in existence at the material time an arrangement between the parties that Soh shall join in the guarantees upon which the instant appellants were sued and that the trial judge ought therefore to have dismissed the respondent's suit.

Accordingly, both these questions must be resolved in their favour.

Appeal To This Court

Before us the main submission of Encik Naban, counsel for the appellant, was that there was no **contract** between the bank and the respondents within the meaning of s. 97 of the Act. The section employs the word **"contract"** which should be given the interpretation and construction as required under s. 2. He stressed that under s. 97 a person must give a guarantee upon a contract. It is a conditional guarantee or a condition precedent. Therefore, before s. 97 could be invoked there must exist a condition precedent that a creditor would not act on the guarantee until the other co-sureties have joined in. He relied on *Byblos Bank SAL v. Al-Khudhairy* [1987] BCLR 232, where he said the facts are similar to the facts in the instant case. Counsel also relied on a passage in Phillips and O'Donovan, *The Modern Contract of Guarantees*, 2nd edn, (at p. 83):

> What is required before the burden is satisfied is a clear understanding that the contract of guarantee is to be executed by particular guarantors.

Both Encik Goonting and Encik Alex Anthony for the respondents, supported the judgment of the Court of Appeal. Encik Goonting contended that the guarantees, P1 and P2 are not the only documents to look at to establish a contract under s. 97, but the contract can also be inferred from the letters exchanged between the bank and the company, at pp. 159, 160, 161 AR. Counsel relied on *Taubmans Pty. Ltd. v. Loakes* [1991] 2 Qd R 109 for the proposition that the content of a document is not the only place to discover the intention of the parties, evidence from other sources is also admissible. We shall discuss *Taubmans* shortly.

The Contract Point

In reaching its conclusion that there was a **contract** under s. 97 between the parties that Soh would join in the guarantees, the Court of Appeal applied one of the propositions which it formulated, *viz.*, the words **"upon a contract"** in s. 97 did not confine the parties to the guarantee but included an **arrangement** between them, collateral to the main contract, whereby it was contemplated that more than one person would execute the guarantee. Therefore, from the evidence which the court termed as the "several pieces of oral and documentary evidence", including oral

testimonies of PW3 and D10, it drew a reasonable and probable inference that there was inexistence at the material time an **arrangement** which constituted a **contract** under s. 97 between the parties that Soh would join in the guarantees.

With respect, we disagree with the above conclusion.

In any contract of guarantee, it may be contemplated that more than one guarantor shall execute the guarantee where such term may be implied from the form of guarantee (*Marston v. Charles Griffin & Co. Pty. Ltd.* [1985] NWSLR 294, at 300-301). Section 97 of the Act deals with a condition precedent to the operation of a guarantee, *ie*, that the guarantee be signed by co-sureties. To found such a condition precedent, it must have been the intention of the parties that the guarantee binds only if all the sureties sign; it is insufficient that the surety merely thought that others will sign. See: Low Kee Yong, *The Law of Guarantees in Singapore and Malaysia* [1992] p. 118. In our view, the condition precedent is predicated on a **contract** made between the person who gives the guarantee and the creditor and in the context of s. 97 the **contract** means an **understanding** between the person who gives a guarantee *ie*, the guarantor or surety and the creditor that the guarantee is only valid if all the guarantors sign. For this proposition, we would rely on the following authorities:

(1) In *Evans v. Bremridge (supra)*, as was known to Evans, the creditor required a guarantee from two responsible persons. The debtor requested Evans to be one of the two, and named the person who would be the other. On that basis Evans placed his signature on the document, believing that the second signature would be duly obtained. In fact it was not. The court held that Evans was not liable. In the view of Knight Bruce LJ the creditor was seeking to enforce a **contract** into which the surety had not entered. Turner LJ agreed with that observation and went on to say at 109; 331:

> I concur in thinking that as the plaintiff entered into the obligation upon the **understanding** and faith that another person would also enter into it, he has a right in equity to be relieved, on the ground that the instrument has not been executed by the intended co-surety.

(2) In *The City Bank v. Reynolds & Ors., supra*, a case relied by the Court of Appeal, it may be recalled that evidence accepted at the trial established that the creditor advanced the money at the express request of four of the seven directors of the debtor company before obtaining the signatures of the other directors. The jury found four directors were liable. In the case of Reynolds, the court found that he was not present when the request to pay before all signatures were obtained, he having signed the guarantee

first. Therefore, his liability depended on the **contract** entered into between the bank and the directors of the debtor company. The learned Chief Justice approached the **contract** point as follows (at p. 64):

> If that contract was that the guarantee was not to be effective until signed by all, and that when he signed alone he did so on this condition – if, in fact, he signed the contract on the faith and **understanding** that all the others must sign, **and this was known to the plaintiffs,** then he is not liable. (emphasis added.)

Based on a letter from the company's secretary to the bank and a reply from the bank's manager, his Lordship found Reynolds not liable for the following reasons (at p. 65):

> When Reynolds called at the bank and signed the guarantee before any of the others did so, he must have done so **on the faith and understanding** that no money would be advanced except on the terms mentioned in the letter, from the plaintiff's manager. We think therefore the case falls within the authority of *Evans v. Bremridge.*

(3) The case of *Taubmans* was not considered by the Court of Appeal. Perhaps, it was not referred to by counsel. The respondent brought an action in the district court against the appellant claiming for the sum of $26,024.40 with interest and costs. The action was brought on a guarantee allegedly given by the appellant. The court granted summary judgment against the appellant. On appeal to the Supreme Court of Queensland, the point taken was that on its face the instrument of guarantee was intended to create joint and several liability in the appellant and one Rumble and that as the instrument was not signed by Rumble it was not binding on the appellant. The court considered *Evans v. Bremridge, Reynolds* and *Stramit*. Dismissing the appeal, the Full Court found (per McPherson J) that on the evidence before the district court, the respondent plaintiff had successfully discharged any onus that might be supposed to lie upon it of showing that the contract of guarantee was intended and known by the appellant to be intended to bind him as soon as he had signed it, irrespective of whether or not Rumble also signed it. The Full Court held that there is no rule of law that where an instrument of guarantee is in a form or in terms that imply it is to be executed by more than one guarantor who are to be jointly and severally liable, all must sign the instrument before any is bound, Each case is to be decided in accordance with common intention of the parties as appearing in the evidence.

Williams J, in a separate judgment analysed *Evans v. Bremridge* and made the following observation with respect to the word "understanding" used by Turner LJ (at p. 116):

> The use of the word **"understanding"** is, in my view, significant. On the facts it appears clear that the **"understanding"** to which the surety was a party involved not only the debtor but also the creditor; it was generally the understanding of all parties that the loan would only be forthcoming if two responsible persons became sureties.

His Lordship made a similar observation when considering *Reynolds* (at p. 117):

> Again in my view, it is significant that the word **'understanding'** was used. **In the context that clearly meant an understanding between the surety and the creditor.** (emphasis added)

Therefore, the crucial question here is: Did the respondents and the directors of the respondent company sign the guarantees on an **understanding** that all directors shall sign the guarantees and if one of them did not sign, the guarantees would be invalid and this was known to the bank?

Considering the evidence of PW1, PW2, PW3 and DW3 as a whole, we draw a reasonable inference that there was no such **understanding** between the respondents and the bank.

DW1, the Managing Director of the company testified that he was the first person to sign the guarantees, P1 and P2. He did not know the person who witnessed his signatures as he did not sign in front of a witness. After signing, he left P1 and P2 to his clerk for him to get other directors to sign. After the other directors had signed, he passed P1 and P2 to Paul Soh, who undertook to sign. He was under the impression that all directors would sign and he had no reason to believe that Paul Soh would not sign.

DW2, the Executive Director, testified that he signed the guarantees because the company needed extra fund for expansion. He stated that had he known that not all directors would sign, he would not have signed. Under cross-examination, he said he signed the guarantees without a witness. Later he said he did not know who witnessed his signatures. He expected DW1 to get the signatures of all the directors.

DW3 stated that only six directors signed the guarantees. Paul Soh's signature was missing. He said he would not have signed had he known Paul Soh was not going to sign. Pausing here, it is to be noted that this assertion is different from saying: "I sign on condition all directors sign." Under cross, he stated that he was aware that if the directors did not sign

the guarantees the company would not get the extra loan. He also stated that he did not take steps to see if all the directors had signed since he expected DW1, the Managing Director to do it.

From the above evidence, first, it seems probable to us that the respondents were not concerned whether all the directors signed the guarantees. What they were interested was to get the extra facility released quickly. The evidence disclosed that if the directors did not join in signing the guarantees, the company would not be able to obtain the loan. According to PW3, the Bank Manager, the facility was disbursed to the company despite six out of seven directors signed the guarantees. From this an inference could be drawn that the intention of the parties was for the directors to sign P1 and P2 quickly and there was no intention on their part that they signed the guarantees on condition that all the directors signed.

Secondly, PW3 testified that there was no such thing that if one of the directors did not sign none would be liable. He stated that if the directors who signed had said this to him or made it known to the bank at the material time he would reply that the loan would not be given to them. From this, we draw a reasonable inference that there was no **understanding** on the part of the bank that the guarantees would only be valid if signed by all directors. To constitute a contract within the meaning of s. 97 the **understanding** in our view must be clear and known to the bank (*Reynolds, supra*). Therefore, at the very least, we venture to say that there is only a **unilateral understanding** on the part of the respondents and the directors of the company that all shall sign the guarantees, otherwise they are invalid.

Conclusion

For the above reasons, we disagree with the Court of Appeal's interpretation of the word **contract** in s. 97 of the Act and its conclusion that there was indeed a **contract** between the parties that Soh would join in executing the guarantees and since he did not do so, the guarantees in the present case were invalid. In our judgment, there is no **understanding** between the appellant and the guarantors which constitutes a **contract** within the meaning of s. 97 of the Act that all directors of the company shall sign the guarantees and since one of them did not sign, the guarantees P1 and P2 are invalid.

Accordingly, we allow these appeals with costs here and below and restore the orders of the High Court. Deposits shall be refunded to the appellant bank.